Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KENNETH HICKS,
Petitioner,

VS.

BROWN GROUP, INC., d/b/a
BROWN SHOE COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether claims of racially motivated discharge from employment are actionable under 42 U.S.C. § 1981 after *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)?

2. Whether the Civil Rights Act of 1991, in particular Section 101 of the Act, applies retroactively to cases pending in court on the date of its enactment?

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OPINION BELOW

The Opinion of the Eighth Circuit Court of Appeals, rendered on December 30, 1992, is officially reported at 982 F.2d 295 (8th Cir. 1992) (en banc).

JURISDICTIONAL STATEMENT

The Judgment of the Eighth Circuit Court of Appeals, rendered en banc, was entered on December 30, 1992. There was no petition for rehearing filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTE INVOLVED

Section 101(2)(b) of the Civil Rights Act of 1991 amends 42 U.S.C. §1981 to include the following language:

> For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

See 42 U.S.C. §1981(b).

STATEMENT OF THE CASE

The history of this case, though complex, can be briefly summarized. In 1982, plaintiff Kenneth Hicks, petitioner herein, was terminated from his job by defendant Brown Group, respondent herein. After he was fired, Mr. Hicks, a white male, brought this lawsuit under 42 U.S.C. §1981 alleging that his termination was due in relevant part to his race. In 1988, a jury agreed with him, though it declined to award him any actual damages. Instead, it awarded him $10,000 in punitive damages on the ground that Brown Group's discrimination was willful. The district court modified the actual damages to $1.00, left the award of punitive damages undisturbed, and entered judgment in favor of Mr. Hicks. On appeal, a panel of the Eighth Circuit Court of Appeals affirmed. *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990).

Defendant Brown Group then filed a petition for certiorari and the U.S. Supreme Court remanded the case to the Eighth Circuit. 111 S.Ct. 1299 (1991). On remand, the panel reversed the jury verdict in favor of Plaintiff Hicks. In an order dated October 9, 1991, it ruled that Mr. Hicks' claim of discriminatory discharge was not actionable under Section 1981 in light of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). *See Hicks v. Brown Group, Inc.*, 946 F.2d 1344 (8th Cir. 1991).

Thereafter, on November 21, 1991, President Bush signed into law the Civil Rights Act of 1991. Section 101 of the Act overturns the *Patterson* case and expressly provides that claims of racially motivated discharge from employment are actionable under Section 1981:

> **SEC. 101. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.**
>
> Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended — . . .
>
> (2) by adding at the end the following new subsections:
>
> "(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and *termination* of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

(emphasis added). Plaintiff Hicks' view was that Section 101 of the Civil Rights Act applied retroactively to his case. Accordingly, he filed a motion to vacate the Eighth Circuit's order dismissing his claim under Section 1981. The Eighth Circuit, however, refused to consider the merits of his retroactivity argument, denied his motion to vacate, and suggested that he file a petition for certiorari with the U.S. Supreme Court. 952 F.2d 991 (8th Cir. 1991).

Mr. Hicks sought a writ of certiorari and the U.S. Supreme Court again remanded, this time "for further consideration in light of the Civil Rights Act of 1991." 112 S.Ct. 1255 (1992). On remand, the Eighth Circuit, sitting en banc, ruled that the Civil Rights Act, in particular Section 101 of the Act, does not apply retroactively to cases pending in court at the time of its enactment. Accordingly, it reinstated the panel's order of October 9, 1991 vacating the jury verdict in favor of Plaintiff Hicks. 982

F.2d 295 (8th Cir. 1992) (en banc). Two judges dissented from this ruling, arguing persuasively that (1) claims of racially motivated discharge from employment remain actionable under Section 1981 even after the *Patterson* case and (2) even if they do not remain actionable, Section 101 of the Civil Rights Act applies retroactively to Mr. Hicks' case and validates the jury's verdict in his favor. *Id.* at 299-303.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

I. THE SUPREME COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DECIDE WHETHER CLAIMS OF RACIALLY MOTIVATED DISCHARGE FROM EMPLOYMENT ARE ACTIONABLE UNDER 42 U.S.C. §1981 AFTER ITS DECISION IN *PATTERSON V. McLEAN CREDIT UNION*, 491 U.S. 164 (1989)

In his dissenting opinion in the court below, Judge Heaney explained why the U.S. Supreme Court should grant certiorari in this case to decide whether claims of racially motivated discharge from employment remain actionable under Section 1981 after *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989):

> I recognize that a divided en banc court resolved [this] issue in the negative in *Taggart v. Jefferson County Child Support Enforcement Unit*, 935 F.2d 947 (8th Cir. 1991). Nonetheless, this issue is raised on appeal and could, and should, be decided differently by this court — if not by this court, then by the United States Supreme Court. I continue to believe that Judge McMillian's eloquent panel opinion in *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990), is the better view of the law. Judge McMillian again expressed his views on this issue in a dissent to *Taggart*, in which he was joined by former Chief Judge Donald Lay and Chief Judge Richard S. Arnold. The dissent supports the proposition that *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), should not bar recovery for employees who have been discharged because of their race. Because the Supreme Court did not specifically address the issue of discriminatory discharge in *Patterson*, it is my hope that it will accept certiorari in this case and resolve the issue once and for all.

Appendix at A8-A9. For the reasons set forth in Judge McMillian's panel opinion, the Court should grant certiorari in this case and hold that claims of racially motivated discharge from employment violate Section 1981.

II. THE SUPREME COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DECIDE WHETHER THE CIVIL RIGHTS ACT OF 1991, IN PARTICULAR SECTION 101 OF THE ACT, APPLIES RETROACTIVELY TO CASES PENDING IN COURT ON THE DATE OF ITS ENACTMENT.

There are three basic reasons why the Court should grant certiorari on this important issue. First, the Eighth Circuit's ruling that the Civil Rights Act of 1991 does not operate retroactively is clearly wrong on the merits. Therefore, it must be corrected by the Court. Second, the Eighth Circuit's ruling conflicts with the Ninth Circuit's ruling in *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1549-1556 (9th Cir. 1992). The Court should grant certiorari in this case to resolve the conflict among the Circuits. Third, the Court has recently granted certiorari in two cases which squarely raise the retroactivity issue. This development shows that the retroactivity of the Civil Rights Act is an important legal issue which warrants review by the Court. Each of these three reasons for granting certiorari will be discussed in turn.

1.

According to the Eighth Circuit, there is no evidence that Congress wanted the Civil Rights Act of 1991 to operate retroactively. Plaintiff Hicks disagrees. The Eighth Circuit failed to discuss, let alone follow, two well-settled rules of statutory interpretation which show that Congress wanted the Civil Rights Act to operate retroactively with two minor exceptions not relevant to the case at bar.

At issue is the meaning of Section 402(a) of the Act. Section 402(a) does not merely provide that the statute will take effect upon enactment. Rather, it provides that "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect on enactment." The statutory phrase "Except as otherwise specifically provided" is highly significant. It can only refer to Section 402(b) and Section 109(c) of the Act since these are the only two sections of the statute which specify when they will take effect. Section 402(b) expressly forbids retroactive application of the statute to the pre-enactment conduct of the employer in the ongoing case of *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989). Similarly, Section 109(c) expressly forbids retroactive application of the statute to the pre-enactment conduct of employers in cases brought under Title VII by American employees working for American companies in foreign countries. These two sections show that Congress knew how, when it wanted to, to provide for prospective-only operation of the statute. Significantly, Congress refused to provide for prospective-only operation of the Act in the remainder of the statute. It is a well-settled rule of statutory interpretation that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. U.S.*, 464 U.S. 16, 23 (1983). By denying retroactivity in the particular circumstances described in Sections 402(b) and 109(c), Congress clearly indicated that the balance of the statute was to be applied retroactively. *See, e.g., In re Salem Mortg. Co.*, 783 F.2d 626, 631 n. 14 (6th Cir. 1986). There is no escape from the conclusion that Congress wanted the Civil Rights Act to operate retroactively except as otherwise specifically provided in Section 402(b) and Section 109(c).

There is a second well-settled rule of statutory interpretation which illuminates the intent of Congress. As this Court has recently reaffirmed, a court must construe a statute so that no part

of it is rendered insignificant or inoperative, redundant or superfluous. *U.S. v. Nordic Village, Inc.*, 117 L.Ed.2d 181, 189 (1992). Some purpose must be ascribed to Section 402(b) and Section 109(c). The Eighth Circuit's reading of the statute, however, leaves them purposeless. According to the Eighth Circuit, there is no evidence that Congress wanted the provisions of the Civil Rights Act of 1991 to apply retroactively to cases pending in court on the date of its enactment. But why would Congress bother to exempt one pending case — the *Wards Cove* case — from the coverage of the statute unless it wanted the statute as a whole to apply to pending cases? Moreover, why would Congress bother to exempt a class of pending cases — those brought under Title VII by American employees working for American companies in foreign countries — from the coverage of the statute unless it wanted the statute as a whole to apply to pending cases? These statutory exemptions would be unnecessary if, as the Eighth Circuit suggests, the statute in general does not apply retroactively to pending cases. Taken seriously, the Eighth Circuit's interpretation renders Section 402(b) and Section 109(c) insignificant and inoperative, redundant and superfluous. They serve no independent function. Indeed, they amount to meaningless statutory graffiti. There is something profoundly wrong with any interpretation of a statute which assumes that Congress has done a completely useless and pointless thing. *Kungys v. U.S.*, 485 U.S. 759, 778-779 (1988). Plaintiff Hicks' interpretation, on the other hand, makes sense of the statute as a whole by giving effect to all of its provisions. His interpretation must be accepted because it ascribes a very clear purpose and function to Section 402(b) and Section 109(c): they serve as exceptions to the general rule of retroactivity set forth in Section 402(a). *See Davis v. City and County of San Francisco*, 976 F.2d 1536, 1549-1556 (9th Cir. 1992).

Significantly, this Court has held that Congress is presumed to legislate with knowledge of these basic rules of statutory interpretation. *McNary v. Haitian Refugee Center, Inc.*, 111 S.Ct.

889, 898 (1991). So it is a safe bet, given the way it wrote and structured the Civil Rights Act, that Congress wanted the statute to operate retroactively. The Eighth Circuit's conclusion to the contrary seriously misreads the intent of Congress and cannot be allowed to stand.[1]

The Eighth Circuit also seriously misinterpreted this Court's decision in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). According to the Eighth Circuit, *Bowen* mandates that a court must presume, when the intent of Congress is unknown, that Congress intends a newly-enacted statute to apply prospectively. This is true, says the court, even when applying the statute retroactively would not be unfair to anyone. This interpretation of *Bowen* is clearly wrong.

Mindlessly applying a rule of law, without regard to its purpose, is intolerable. Yet that is precisely what the Eighth Circuit did in this case. The court invoked the legal presumption of prospectivity set forth in *Bowen* to support its conclusion that the Civil Rights Act does not apply retroactively to Mr. Hicks' case. But the court neglected to consider the *purpose* behind the *Bowen* rule of law. As Justice Scalia has explained, the legal presumption that Congress intends its legislation to operate

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[1]The Eighth Circuit concluded that Congress could not agree on whether the provisions of the Civil Rights Act should be retroactive or prospective, with the exceptions of Section 402(b) and Section 109(c), and therefore left it up to the courts to decide. The problem with this conclusion, however, is that it is based on speculation. Although the remarks of some members of Congress support the Eighth Circuit's conclusion, the remarks of other members of Congress clearly refute it. *See, e.g.*, 137 Cong. Rec. H9548 (Rep. Hyde); 137 Cong. Rec. S15966 (Sen. Durenberger); 137 Cong. Rec. H9530 (Rep. Edwards). The legislative history, in other words, is hopelessly contradictory. Under these circumstances, courts must stick to the *text* of the Civil Rights Act, and the reasonable inferences to be drawn from it, in analyzing Congressional intent. The legislative history of the Act can, and should, be ignored. *Green v. Bock Laundry Co.*, 109 S.Ct. 1981, 1994 (1989) (Scalia, J., concurring).

prospectively "gives effect to enduring notions of what is fair" and thus accords with probable legislative intent. *Kaiser v. Aluminum & Chemical Corp. v. Bonjorno*, 110 S.Ct. 1570, 1587 (1990) (Scalia, J., concurring). Absent unfairness, there is no reason to presume that Congress wants a newly-enacted statute to operate prospectively. On the contrary, there is every reason to presume the exact opposite: that Congress wants the statute to operate retroactively. *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974). After all, the policy considerations which prompted Congress to enact the legislation will be furthered, rather than frustrated, if the legislation is given immediate effect in pending litigation. *U.S. v. Angiulo*, 755 F.2d 969, 971 (1st Cir. 1985). Because the Eighth Circuit failed to apply a fairness analysis, which is implicit in *Bowen*, its opinion must be set aside. *See Gersman v. Group Health Ass'n., Inc.*, 975 F.2d 886, 900-915 (D.C. Cir. 1992) (Wald, J., dissenting).

Applying Section 101 of the Civil Rights Act to the present case will not be unfair to Defendant Brown Group. The fundamental reason for prospective application of a statute, as Justice Scalia has emphasized, is to ensure that "the legal effect of conduct [will] be assessed under the law that existed when the conduct took place." *Bonjorno, supra*, 110 S.Ct. at 1586. That is not a problem here. The key event giving rise to this litigation — Mr. Hicks' termination from employment — took place in 1982. At that time, the law in the Eighth Circuit, and everywhere else, was that a racially motivated discharge from employment violated Section 1981. Appendix at A12. It was not until 1989, seven years later, that the U.S. Supreme Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), and dramatically narrowed the scope of Section 1981. Congress concluded, however, that *Patterson* wrongly construed Section 1981. Section 101 of the Civil Rights Act corrects the error and restores the law to where it was before *Patterson* was decided. The law now, as it was in 1982, is that a racially motivated discharge from employment violates Section 1981.

Under these circumstances, Defendant Brown Group cannot complain of any unfairness. There is nothing unfair about holding an employer accountable for acts of intentional discrimination which were unlawful when they were committed and which would likewise be unlawful if committed today. *U.S. v. Johns*, 742 F.Supp. 196, 217-218 (E.D. Pa. 1990). A retroactive statute is unfair only when it renders conduct unlawful which, when it was done, was lawful. *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121, 1127 (D.C. Cir. 1985). That is not the situation here. Applying Section 101 of the Civil Rights Act to this case will mean that the parties will be governed by the law they all understood to exist at the time the challenged termination from employment took place. Nothing could be fairer.

2.

The Eighth Circuit's ruling in this case directly contradicts the Ninth Circuit's ruling in *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992). In *Davis*, the Ninth Circuit carefully analyzed the text and structure of the Civil Rights Act and concluded that Congress intended the Act to operate retroactively. *Id.* at 1549-1556. The Eighth Circuit, however, rejected the Ninth Circuit's analysis. Appendix at A3-A5. As a result, there exists a conflict among the Circuits over the interpretation of the Act which requires authoritative resolution by this Court.

This conflict among the Circuits is sufficient reason, by itself, to grant certiorari in this case. The Civil Rights Act of 1991 is a landmark statute. Whether it does, or does not, apply to the thousands of Section 1981 and other civil rights cases currently pending in the federal court system is a question of exceptional national importance. For this reason alone, Plaintiff Hicks' petition for certiorari should be granted. *Massachusetts Trustees v. United States*, 377 U.S. 235, 237 (1965) (certiorari granted because of a conflict among the Circuits and the fact that "a

considerable number of suits are pending in the lower courts which will turn on resolution of these issues").[2]

3.

Finally, it is crucial to point out that this Court has recently granted certiorari in two cases which squarely raise the issue of the retroactivity of the Civil Rights Act of 1991: (1) *Landgraf v. U.S.I. Film Industries*, 968 F.2d 427 (5th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3558 (February 22, 1993) and (2) *Rivera v. Roadway Express*, 973 F.2d 490 (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3558 (February 22, 1993). Significantly, the *Rivera* case, like this case, is a Section 1981 case. Thus, it raises the same legal issue — the retroactivity of Section 101 of the Civil Rights Act — as the present case. The course of action the Court should follow under these circumstances is clear enough:

> Where the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari has been granted, the issue is obviously important and the Court will either grant the petition and set the case for argument or postpone consideration of the petition until the other case has been decided and then make summary disposition of the case in accordance with that decision.

See Stern, Gressman and Shapiro, *Supreme Court Practice*, §4.16 at p. 221 (Sixth ed. 1986). The Court should grant certiorari in this case or, alternatively, hold the case in abeyance

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[2]Although the majority of Circuits have held that the Civil Rights Act does not apply retroactively, they have often done so over vigorous and well-reasoned dissenting opinions. *See, e.g., Gersman v. Group Health Ass'n., Inc.*, 975 F.2d 886, 900-915 (D.C. Cir. 1992) (Wald, J., dissenting); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1379-1382 (8th Cir. 1992) (Heaney, J., dissenting); *Mozee v. American Marine Service Co.*, 963 F.2d 929, 940-941 (7th Cir. 1992) (Cudahy, J., dissenting).

pending an authoritative resolution of the retroactivity issue in the *Landgraf* and *Rivera* cases.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari, vacate the judgment of the Eighth Circuit, and remand the case with directions to enter judgment in favor of Plaintiff Hicks.

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